WONG TON YANG
(PRESIDENT OF CHINESE CHAMBERS OF COMMERCE)

v.

CHEE CHAW NAW

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J
[ORIGINATING SUMMONS NO. 481 OF 1992]
21 DECEMBER 1994

PRACTICE & PROCEDURE*: Application to set aside consent judgment - Application filed in the High Court - Whether proper - Whether application should have been filed in the Court of first instance - Whether there were any merits in the application.*

The plaintiff was sued in the Magistrate's Court at Kulai and had a consent judgment entered against him. The plaintiff applied to the High Court to set aside the consent judgment on the grounds that the solicitor concerned did not have the authority to enter the said consent judgment. The other question that arose was whether it was proper for the plaintiff to have filed the application in the High Court or whether the application should have been made to the Court of first instance.

Held:

[1] It is not disputed that in order to set aside a consent judgment a separate action needs to be filed. Following the passage to be found at paragraph 562 of pages 286-287 of *Halsbury's Laws of England*, 4th. Edn., Vol. 26, it appears that the filing of the application in the High Court is in order. In any event the application of the plaintiff is to seek a declaratory order to set aside the consent judgment and the Subordinate Courts have no jurisdiction to make declaratory orders.

[2] On a perusal of the affidavits of the former solicitor of the plaintiff, and his clerk, the Court was inclined to accept the explanation that the said solicitor did get the authority of the plaintiff to enter into the consent judgment. This is further supported by the fact that a cheque for the sum of RM810 was issued for mesne profits and another cheque for RM300 was issued for the fees of the said solicitor. In the circumstances, the consent judgment was rightly entered as the plaintiff's position in law was untenable.

[Plaintiff's originating summons dismissed with costs].

Case referred to:
Vengadasalam v. Khor Soon Weng & Ors. [1985] 2 MLJ 449 ***(refd)***

Legislation referrred to:
Subordinate Courts Act 1948 ss. 69 & 93
Subordinate Court Rules 1980, O. 26A

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 26, pp. 286 & 287 para. 562

For the plaintiff - G.S. Khoo (S.K. Teo with her); M/s. G.S. Khoo & Co.
For the defendant - Gana Muthusamy; M/s. Gana Muthusamy & Co.

JUDGMENT

Haidar bin Mohd. Noor J:

In this originating summons, the plaintiff is seeking:

(a) That the consent judgment dated 29 June 1992 entered in Magistrate's Court, Kulai under summons No. 72-20 of 1991 be set aside;

(b) That all proceedings and/or execution in Magistrate's Court, Kulai be stayed until final disposal of this action;

(c) Such other relief as this Honourable Court deems fit;

(d) Cost in this action.

It is supported by the affidavit of the plaintiff himself (encl. 2).

In the course of hearing the originating summons, the plaintiff's Counsel sought an adjournment to apply for amendment to the originating summons. Subsequently the plaintiff filed an application (encl. 13) seeking to add the following order:

(a) Deklarasi bahawa Perjanjian yang terkandung di dalam Penghakiman Persutujuan yang bertarikh 29hb. Jun 1992 yang dimasukkan di Mahkamah Majistret Kulai di bawah saman No. 72-20 Tahun 1991, dibatalkan dan tak sah; Dan/Atau:

Order in terms was made by the Court after the Counsel for the defendant did not object to the said application.

On reflection I am of the view that it was not necessary for such an amendment to be made as the effect of the original originating summons to set aside the consent judgment dated 29 June 1992 would have the same desired effect, that is, based on the agreement of the parties to the consent judgment. In essence, what is required of the Court to consider is whether the consent judgment should be set aside. From the affidavit in support of the originating summons, the plaintiff is relying only on one ground, that is, the solicitor acting for the plaintiff (as defendant) did not have the authority to enter into a consent judgment with the defendant's (plaintiff's) solicitor in the Magistrate's Court, Kulai on 29 June 1992.

Procedure

The Counsel for the defendant by way of a preliminary issue, raised the question of whether the proceedings in the nature of originating summons is the proper procedure for the plaintiff to proceed to set aside the consent judgment obtained in the Magistrate's Court, Kulai. The Counsel for the defendant contended that the plaintiff should proceed by way of a separate action in the Magistrate's Court, Kulai to set aside the consent judgment. The Counsel for the plaintiff, on the other hand, contended that it amounted to a rescission of the contract between the parties and relied on ss. 69 and 93 of the Subordinate Courts Act 1948 as showing that the Magistrate's Court has no jurisdiction to hear the application of the plaintiff. With respect, I am unable to follow the argument of the Counsel for the plaintiff as the ground relied on by the plaintiff is only confined to the lack of authority on the part of his solicitor to enter the consent judgment. As I said earlier there would appear to be no necessity to amend the originating summons.

It is not disputed that in order to set aside a consent judgment a separate action needs to be filed. This the plaintiff had done. The next question is whether it should be filed in the Court of first instance in the original action i.e. the Magistrate's Court as contended by the Counsel for the defendant. The answer to this question can be found in para. 562 of pp. 286/287 *Halsbury's Laws of England*, 4th Edn. Vol. 26:

> Unless all parties agree, a consent order, when entered, can only be set aside by a fresh action, **and an application cannot be made to the Court of first instance in the original action to set aside the judgment or order**, except apparently, in the case of an interlocutory order. Nor can it be set aside by way of appeal. [emphasis is mine]

It appears therefore that the filing of the application in the High Court by the plaintiff is in order. In any event the application of the plaintiff is to seek a declaratory order to set aside the consent judgment. The Subordinate Courts have no jurisdiction to make declaratory orders (see ss. 69 and 93 of the Subordinate Courts Act, 1948).

In the circumstances the procedural issue raised by the Counsel for the defendant cannot be sustained.

Consent Judgment

It is not disputed that in the Magistrate's Court, Kulai *vide* summons No. 72-20-91 the plaintiff was sued as a defendant therein in the capacity of chairman of the Chinese Chamber of Commerce (see para. 2 of the statement of claim and para. 2 of the statement of defence in Exhibits "WTY1" and WTY2" in encl. 2). The tenancy was between the Chinese Chamber of Commerce as the tenant and the defendant as the landlord of the premises known as 144, Main Road, 81400 Senai as indicated by exhibits to the application under O. 26A of the Subordinate Courts Rules 1980 taken by the defendant as plaintiff therein (see Exhibit `WW3' in encl. 2). The consent judgment obtained by way of O. 26A is a final judgment.

It would seem clear from the affidavit of Mr. C.F. Wong, the solicitor acting for the plaintiff as defendant in the lower Court, the consent judgment was entered as it is settled law that a lease or tenancy cannot be granted to an unincorporated society such as the Chinese Chamber of Commerce, which has no legal personality as it is only a composite entity of fluctuating content and not *persona legalis* (see *Vengadasalam v. Khor Soon Weng & Ors.* [1985] 2 MLJ 449). In other words, there was no subsisting tenancy either at law or in equity. It was on this basis that Mr. C.F. Wong, as solicitor, advised the plaintiff to settle the case and the plaintiff gave his consent to the judgment in the Magistrate's Court. However, the plaintiff disclaimed giving such authority to Mr. C.F. Wong. On a perusal of the affidavits of Mr. C.F. Wong and his clerk, Jamiah bte Ajmain exhibited to the affidavit of Gana Muthusamy (encl. 9) *vis-a-vis* the affidavits of the plaintiff and one Lee Hun Seng, I am inclined to accept the explanation of C.F. Wong as supported by the affidavit of Jamiah bte Ajmain that Mr. C.F. Wong did get the authority of the plaintiff to enter into the consent judgment in the Magistrate's Court, Kulai. This is further supported by the fact that a cheque for the sum of RM810 was issued for the mesne profits and another cheque for RM300 issued for the fees of Mr. C.F. Wong (see Exhibits "WCF11" and "WCF12"). The consent judgment was rightly entered as the plaintiff's position in law was untenable.

In the circumstances, there are no good grounds for me to allow the declaration sought by the plaintiff in the originating summons and I accordingly dismiss it with costs.